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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1819

FRANK R. WEST,
Petitioner,
VERSUS
THEODORE JANING,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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FRANK R. WEST,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

INTRODUCTION

Petitioner, Frank R. West, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nebraska filed on January 17, 1979, denying Mr. West's petition for a writ of habeas corpus to prevent, on federal constitutional grounds, his extradition from his home in Nebraska to the State of Iowa.

OPINION BELOW

The opinion of the Supreme Court of Nebraska is reported as *West* v. *Janing*, 202 Neb. 141, 274 N.W.2d 161 (Jan. 17, 1979). A copy thereof is attached as Appendix A to this Petition.

JURISDICTION

The judgment of the Supreme Court of Nebraska was filed and entered on January 17, 1979. A timely petition for rehearing was denied on April 11, 1979 and this petition was filed within ninety (90) days of that date. This Court's jurisdiction is properly invoked under 28 U.S.C. §1257(3). *See, e.g., Coleman* v. *Alabama*, 377 U.S. 129, 133 (1964).

QUESTIONS PRESENTED

1. Whether Article IV, §2 of the Constitution, as interpreted in *Michigan* v. *Doran*, ... U.S. ....., 99 S.Ct. 530 (1978), deprives the courts of a citizen's home State of the power to adjudicate whether, on undisputed facts, he has a valid defense to extradition, on federal constitutional grounds, such as a previous denial by the demanding State of the citizen's Sixth and Fourteenth Amendment rights to a speedy trial on the charges against him?

2. Whether, in a *habeas* proceeding resisting extradition, comity between the several States requires the courts of a citizen's home State to decline to adjudicate the effect of action of a sister State which *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964); *Douglas* v. *Buder*, 412 U.S. 430 (1973); and *Marks* v. *United States*, 430 U.S. 188 (1977), hold violative of the Due Process Clause of the Fourteenth Amendment, when that action is the basis for the resistance to extradition?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of Article IV, §2, Cl. 2, of the Constitution, the Sixth Amendment and the Fourteenth Amendment as well as the Uniform Criminal Extradition Act, as adopted in Nebraska, appear as Appendix B to this Petition.

STATEMENT OF THE CASE

Frank R. West, a resident of Omaha, Nebraska, was formerly President and Chief Executive Officer of American Beef Packers, Inc. ("ABP"). ABP was once the second largest packing house and the 218th largest corporation in the United States.

On January 7, 1975, ABP filed a petition for reorganization under Chapter XI of the Bankruptcy Act in the District Court for the District of Nebraska. The pre-Chapter XI difficulties of ABP resulted in a number of actions against Mr. West, including the present attempt by the State of Iowa to prosecute Mr. West for the charge of obtaining money by false pretenses.

The present extradition proceeding represents Iowa's second attempted prosecution of Mr. West.

In August, 1975, Mr. West, in response to indictments charging the offense of false pretenses, waived extradition and voluntarily subjected himself to the jurisdiction of the Iowa courts to answer to indictments filed against him.

On October 11, 1976, the District Court for Story County, Iowa, entered its opinion dismissing the indict-

ments on the ground the indictments did not state an offense under Iowa law. The State appealed. On April 20, 1977, the Supreme Court of Iowa reversed the decision of the District Court and remanded the case for trial. *State* v. *West,* 252 N.W.2d 457, *cert. denied,* ..... U.S. ....., 98 S.Ct. 177 (1977). In reversing, the Supreme Court of Iowa expressly acknowledged that the District Court's decision correctly stated *existing* Iowa law that

> "up to this point in time, a false promise generated from a transactional contract between offender and victim, without more, *has not been treated as a criminal false pretense in this State.* This is also the approach taken in a majority of the jurisdictions . . ." 252 N.W.2d at 460 (emphasis added).

The Supreme Court of Iowa, however, determined to "reexamine our position" on this question, and rejected the "previous position taken by this Court . . ." under which the acts charged against Mr. West would not have constituted the crime of false pretenses.

Following remand, the District Court entered an order setting the date for trial of the case, by agreement of the parties, as September 7, 1977.

A week before the trial, on August 31, 1977, the State sought an indefinite continuance of the trial. The District Court held the State's request without merit and denied it. The next day the State sought an order from the District Court dismissing the indictment against Mr. West without prejudice. Mr. West demanded that the long-scheduled trial against him go forward on the date previously agreed to by all counsel, and insisted that the State's tactics were

a strategic ploy violative of Mr. West's rights under the Sixth Amendment, made applicable to the States by the Fourteenth Amendment.

The Iowa prosecutors, however, were successful in obtaining dismissals of the pending indictments against Mr. West without prejudice.

Late in December, 1977, the State of Iowa filed an information, again charging the crime of obtaining money by false pretenses. This information forms the basis for the current attempt to extradite Mr. West from Nebraska to Iowa.

On this occasion, Mr. West has resisted extradition. Mr. West filed, in the District Court for Douglas County, Nebraska, a petition for habeas corpus, contending:

> (1) the undisputed record of the previous Iowa prosecution, put into evidence before the *habeas* court, unequivocally demonstrated that the Iowa prosecutors knowingly, and for their own purposes, denied Mr. West his constitutionally guaranteed right to a speedy trial in a manner violative of *Dickey* v. *Florida*, 398 U.S. 30 (1970), and *Barker* v. *Wingo*, 407 U.S. 514 (1972); and
>
> (2) the action of the Supreme Court of Iowa in radically expanding the scope of Iowa's criminal false pretenses statute, and then applying this construction retroactively upon Mr. West so as to criminalize acts which occurred, if at all, more than two years before the date of the Supreme Court's decision, violated the constitutional command against retrospective enlargement of a criminal statute by judicial construction,

enunciated by this Court in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964); *Douglas* v. *Buder*, 412 U.S. 430 (1973) and *Marks* v. *United States*, 430 U.S. 188 (1977) (R. p. 1).

On April 28, 1978, the District Court for Douglas County, Nebraska, denied Mr. West's petition for habeas corpus (R. p. 18), expressly refusing to review the merits of either constitutional claim. The District Court held it had no proper authority to consider these issues, even though they were presented upon a full, complete and undisputed record of the facts.

Mr. West took a timely appeal to the Supreme Court of Nebraska. On January 17, 1979, the Supreme Court of Nebraska held it was powerless, under this Court's recent decision in *Michigan* v. *Doran*, ... U.S. ....., 99 S.Ct. 530 (1978), to determine the question of whether Mr. West had been denied his right to a speedy trial in violation of the Sixth and Fourteenth Amendments to the Constitution, and, therefore, equally powerless to consider whether such a constitutional deprivation should prevent his extradition from Nebraska to Iowa. *West* v. *Janing*, 202 Neb. 141, 143, 274 N.W.2d 161, 162-163.

The Supreme Court of Nebraska also held that the question of whether the Supreme Court of Iowa, in giving retroactive application to its drastically expanded interpretation of Iowa's false pretenses statute, had violated the principles of *Bouie*, *Douglas*, and *Marks*, while perhaps still open for consideration under *Doran*, should, as a matter of comity, be determined by the Supreme Court of Iowa, or by this Court. The Supreme Court of Nebraska, there-

fore, held that it would not consider whether Mr. West's rendition from Nebraska to Iowa should be prevented on this ground. *West* v. *Janing*, 202 Neb. 141, 148, 274 N.W.2d 161, 165.

REASONS FOR GRANTING THE WRIT

This case presents, on a clear and complete record, important and unresolved questions as to the proper interpretation of Article IV, §2 and of that section's relationship to other provisions of the Constitution. These questions are matters of substantial importance in determining the proper function of the Extradition Clause in our federal system, and should receive plenary consideration by the Court.

Additionally, the decision below, which expressly states it was rewritten before its issuance in order to consider the effect of *Michigan* v. *Doran*, ... U.S. ....., 99 S.Ct. 530 (1978), upon petitioner's constitutional contentions, raises important questions as to the proper bounds of the *Doran* holding, and, we believe, is a serious misapplication of the principle laid down in *Doran*.[1] The questions presented here go to the core of the scope of inquiry into deprivation of a citizen's rights committed by the demanding State, and the manner of effective enforcement

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[1] "Since the original draft of this opinion was prepared, the Supreme Court of the United States has released its opinion in *Michigan* v. *Doran*, ... U.S. ....., ... S.Ct. ....., ... L.Ed.2d ..... (Dec. 18, 1978). That case makes it clear that the court of the asylum State has no authority under the Constitution of the United States to determine such issues [as whether the demanding State has denied the petitioner a speedy trial]." *West* v. *Janing*, 202 Neb. 141, 143, 274 N.W.2d 161, 162.

of constitutional guarantees, on pre-rendition habeas corpus resisting extradition. *Cf., Michigan* v. *Doran*, ... U.S. ....., 99 S.Ct. 530, 537-538, nn. 3, 5 (Blackmun, J., concurring).

Doran held that the courts of the asylum State may not re-examine a *factual* determination (the existence, *vel non*, of probable cause to believe the person charged committed the crime at issue) when that factual determination has previously been made by a judicial officer of the demanding State. *Doran, supra*, ... U.S. ....., ..., 99 S.Ct. 530, 536.

The court below, however, in the first (and, so far as our research discloses, the only) case in the United States to consider the effect of *Doran*, read *Doran* (without the benefit of briefing or argument by the parties, since this case was submitted prior to the time *Doran* was handed down) to forbid determination by it of the purely *legal* questions presented here: whether the *undisputed* factual record of Iowa's previous aborted prosecution of Mr. West discloses conclusively that the Iowa prosecutors deliberately denied Mr. West his right to a speedy trial in violation of the Sixth and Fourteenth Amendments; whether re-trial of Mr. West by Iowa is, therefore, barred by the Constitution, *see, Barker* v. *Wingo*, 407 U.S. 514, 522; and whether, in such circumstances, the "charge" supporting the extradition request is a "*valid* legal charge . . ." *Fowler* v. *Ross*, 196 F.2d 25, 32 (D.C. Cir. 1952),[2] ". . . *for which* the person *may* [lawfully] *be returned* to the state for trial . . ." *Munsey* v. *Clough*, 196 U.S. 364, 373 (1905) (emphasis added).

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[2] The extradition statute, 18 U.S.C. §3182 ". . . of course has reference to a *valid* legal charge . . .;" (emphasis added).

Nothing in *Doran* speaks to such questions, and there is no indication the Court intended to decide them *sub silento*.

If, however, the Court did mean to include purely *legal*, as well as factual, questions within the holding of *Doran*, and if it intended to include purely legal questions which have *not* previously been determined by a judicial officer in the demanding State in the course of issuing the fugitive warrant, then the Court should clarify the requirements of the evidentiary showing that will rebut the "prima facie evidence that the constitutional and statutory requirements have been met," which the Governor's extradition warrant constitutes. *Doran, supra,* ..... U.S. ....., 99 S.Ct. 530, 535.

If, as the Supreme Court of Nebraska believed, *Doran* must be interpreted to mean that *no* evidentiary showing is *ever* sufficient, the Governor's warrant becomes something far more than the "prima facie evidence" of which the Court spoke in *Doran;* it becomes conclusive. The practical effect of such a holding is to eviscerate the provision for habeas corpus inquiry contained in Section 10 of the Uniform Criminal Extradition Act (enacted in Nebraska as R.S. 1943, 29-729), and in other similar statutes. *See, State* v. *Uttech*, 31 Wis.2d 513, 143 N.W.2d 500, 503 (1966) (If Governor's extradition warrant is conclusive, ". . . there would be very little purpose in providing a statutory right to habeas corpus [in the Uniform Act].")

Doran is the first full-dress opinion of this Court interpreting the Extradition Clause since *Biddinger* v. *Commissioner of Police*, 245 U.S. 128 (1917), was decided more

than sixty years ago. The decision of the court below is the first in the Nation to consider the effect of *Doran* on extradition habeas corpus proceedings and, if it is allowed to go unreviewed, may well be the progenitor of a line of authority expanding the *Doran* holding far beyond its Fourth Amendment context. Petitioner submits that the expansion of *Doran* by the court below is an unwarranted and unjustified interpretation of the Extradition Clause; if so, plenary review of the decision below is warranted to prevent such an interpretation from gaining precedential force. The holding below, which extends *Doran* to virtually *every* constitutional claim, even when the facts are not in dispute, should not be allowed to go without examination by this Court.

This is especially true since the question of the proper scope of review of constitutional questions of pre-rendition habeas corpus is an important and recurring one upon which the courts of the several States are in disagreement. *Compare, Ex Parte Cooper,* 53 Cal.2d 772, 349 P.2d 956 (1960), appeal dismissed and *cert. denied,* 364 U.S. 294 (*Held:* if it clearly appears that the statute which is the foundation of the indictment and, therefore, the extradition is unconstitutional, the accused should be discharged) and *Commonwealth* v. *Gedney,* 240 Pa.Super. 226, 363 A.2d 786 (1976) (same, although right to assert constitutional question waived by failure to raise it) with *Roscoe* v. *Warden,* 23 Md.App. 516, 328 A.2d 64 (1974) (contra); and *Denton* v. *Cronin,* 529 P.2d 644 (Colo. 1974) (contra, although indicating the issue could properly be raised on federal habeas corpus review);[3] *see also, Wise* v. *State,* 197

[3] *Quaere:* in which State?

Neb. 831, 251 N.W.2d 373, 378 (1977) (constitutional question would not be determined by court of the asylum State "at least in the absence of a complete record of the facts upon which the issue must depend").[4]

Doran, a decision carefully written to speak to the single Fourth Amendment issue of re-examination of a factual issue in the asylum State, has been held by the court below to preclude *habeas* review even of purely legal questions of constitutional magnitude prior to rendition. Petitioner submits this construction of *Doran* is erroneous; in any event, it should be given plenary review by this Court to provide guidance on a recurring question of substantial importance in the federal system.

The same considerations for granting review apply to the holding below that, as a matter of comity, a citizen must seek relief from a State Supreme Court's retroactive application of a drastic expansion of a criminal statute from the same Court which has *already made* the determination to apply the expanded version of the statute retroactively against him. Imposing such a futile requirement upon a citizen is, surely, a hollow misconception of the wise values which underlie the notion of comity between Courts of the several States.

Such precedent in this Court as may be thought to bear on this question plainly indicates that requiring a citizen of one State to stand trial upon a "charge" which

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[4] In reliance upon this statement, petitioner herein *did* put into evidence "a complete record of the facts upon which the issue must depend." The completeness of the record was not disputed by the prosecution at the *habeas* hearing.

exists wholly by virtue of an unconstitutional application of a penal statute by the Supreme Court of another State is not within any concept of comity between the States. *Cf., Nelson* v. *George,* 399 U.S. 224, 229 and n.6 (1970); *Huntington* v. *Attrill,* 146 U.S. 657 (1892).

CONCLUSION

The decision of the Supreme Court of Nebraska, the first in the country to consider the effect of this Court's opinion in *Michigan* v. *Doran.* ..... U.S. ....., 99 S.Ct. 530, seriously misinterprets it, and substantially distorts both the concept of "comity" and its place in the Constitutional scheme of which the Extradition Clause is a part. If allowed to go unreviewed, its potential as a precedent for

other State Supreme Courts is greatly enhanced; and a precedent it should not become.

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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June, 1979

CERTIFICATE OF SERVICE

This is to certify that the undersigned has mailed three (3) copies of the foregoing Petition for Writ of Certiorari in conformity with Rule 33 of the Supreme Court Rules to the Attorney General of the State of Nebraska, by serving:

Paul W. Snyder
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509

this ..... day of ..... , 1979, with postage fully prepaid thereon.

.....

APPENDIX A

OPINION OF THE SUPREME COURT OF NEBRASKA
(274 N.W.2d 161)

Frank R. WEST, Appellant,
v.
Theodore JANING, Sheriff, Douglas County, Nebraska, Appellee.

No. 42136.

Supreme Court of Nebraska.
Jan. 17, 1979.

A habeas corpus proceeding was brought in resistance to a warrant of extradition issued by the Governor of the State of Nebraska upon the requisition of the Governor of Iowa. The District Court, Douglas County, Clark, J., denied habeas relief, and petitioner appealed. The Supreme Court, Clinton, J., held that the issues raised by petitioner were subject to resolution in the demanding state.

Affirmed.

1. Extradition and Detainers Key 39

Issue whether subject of extradition had been denied speedy trial in prior prosecution in demanding state on same charges was question for demanding state to determine.

2. Extradition and Detainers Key 39

Where, although subject of extradition warrant contended that he was not "charged" with crime under law of demanding state, since his prosecution arose out of "an unforeseeable judicial enlargement of a criminal statute, applied retroactively," it was doubtful, in light of precedents in demanding state, that such allegations were accurate, determination of such constitutional issue was for

demanding, not asylum, state. I.C.A. § 713.1; U.S.C.A.Const. art. 4, § 2; Amend. 14; R.R.S.1943, §§ 29-729, 29-731, 29-734, 29-738.

Syllabus by the Court

1. Whether or not the state demanding extradition has violated the right of a fugitive to a speedy trial is a question for the demanding state to determine.

2. It is the obligation of the asylum state in extradition proceedings to determine whether the requisition charges a crime under the law of the demanding state.

3. An unforeseeable judicial enlargement of a criminal statute applied retroactively is impermissible under the Fourteenth Amendment to the Constitution of the United States.

4. In an extradition proceeding, where an examination of prior judicial precedent of the demanding state makes it at least doubtful that the demanding state is attempting to retroactively apply a judicial enlargement of criminal statutes, the asylum state ought, as a matter of comity, to refrain from determining the issue in analogy to the principle that the constitutionality of the statutes of a sister state defining a crime sould be tested in the sister state.

James P. Linn and B. J. Rothbaum, Jr., of Linn, Helms, Kirk & Burkett, Oklahoma City, Okl., David S. Lathrop of Lathrop, Albracht & Swenson, Omaha, Thomas J. Cahill of Nelson & Cahill, Nevada, Iowa, for appellant.

Paul L. Douglas, Atty. Gen., Paul W. Snyder, Asst. Atty Gen., for appellee.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, McCOWN, CLINTON, BRODKEY and WHITE, JJ., and BLUE, District Judge.

CLINTON, Justice.

This is a habeas corpus action commenced in the District Court for Douglas County against the sheriff of that county. The action is in resistance to a warrant of extradition issued by the Governor of the State of Nebraska upon a requisition by the Governor of Iowa. The requisition is based upon an Iowa grand jury indictment charging the petitioner West with obtaining property under false pretenses. After the introduction of evidence and hearing, the District Court for Douglas County denied the relief requested by the petitioner and he appeals to this court.

The petitioner asserts that the District Court committed error of constitutional magnitude in denying him relief, because the record indisputably establishes that the State of Iowa is constitutionally barred from trying West and is therefore also barred from depriving him of his liberty by extraditing him. The assignment is founded upon the three following propositions: (1) The evidence shows that, in a previously commenced prosecution for the same offenses (later dismissed by the State of Iowa without prejudice), the State of Iowa deprived West, over his objection, of his statutory and constitutional right to a speedy trial. (2) In the pending prosecution the State of Iowa is attempting to prosecute him for transactions which were not crimes under Iowa law at the time the prosecution commenced, and became such only through a retroactive interpretation by the Iowa Supreme Court of section 713.1, Iowa Code, after an appeal by the state from the dismissal of the charges against West by the trial court. *State* v. *West*, 252 N.W.2d 457 (Iowa, 1977). The pending prosecution in Iowa is, therefore, in effect a prosecution under an ex post facto law and deprives West of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States. *Bouie* v. *City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894. (3) It follows from the foregoing that, since an ex post facto law is no law at all, the

record shows the defendant West has not been "charged" with an offense within the meaning of Article IV, section 2, of the Constitution of the United States and the pertinent provisions of the Uniform Criminal Extradition Act of the State of Nebraska.

[1] We decline to determine the speedy trial issue. In *Wise* v. *State*, 197 Neb. 831, 251 N.W.2d 373, we said that whether or not the state demanding extradition has violated the right of a fugitive to a speedy trial is a question for that state to determine. It is presumed that the demanding state will recognize any well-founded claims of a violation of the petitioner's constitutional rights.

Since the original draft of this opinion was prepared, the Supreme Court of the United States has released its opinion in *Michigan* v. *Doran*, —— U.S. ——, 99 S.Ct. 530, 58 L.Ed.2d 521 (1978). That case makes it clear that the court of the asylum state has no authority under the Constitution of the United States to determine such issues. The Supreme Court there said: "Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable. . . . We hold that once the governor of the asylum state has acted on a requisition for extraditon based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state."

[2] It is not absolutely clear that the Supreme Court's opinion in *Doran* precludes this court from considering the petitioner's second contention under the facts here. It is clearly our duty to determine whether or not the requisition and its attachments charge a crime under the laws of

the demanding state. *Austin* v. *Brumbaugh*, 186 Neb. 815, 186 N.W.2d 723; *State of Kansas* v. *Holeb*, 188 Neb. 319, 196 N.W.2d 387; §§ 29-731, 29-734, 29-738, R.R.S. 1943. See, also, *State* v. *Ritter*, 74 Wis.2d 227, 246 N.W.2d 552; *Michigan* v. *Doran, supra*. However, whether we should do more than merely determine that the indictment or information charges a crime under the statutes of the demanding state is not made certain by *Doran*. We therefore examine West's allegation that the record clearly and conclusively establishes that West is not "charged" with a crime under the law of the State of Iowa.

Section 713.1, Iowa Code, for violation of which West was indicted, insofar as is pertinent, reads as follows: "If any person designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtain from another any money, goods, or other property, . . . shall be imprisoned. . . ." The various informations pled that between certain dates: "The said Frank R. West obtained cattle from (a named person) of (a certain town), Iowa, by means of false pretenses." Pursuant to Iowa practice, bills of particulars were demanded and filed which, briefly summarized, allege that West was an officer of American Beef Packers (hereinafter ABP) which purchased cattle from owners pursuant to "grade and yield" contracts under which no cash changed hands at the time of delivery by the seller as payment was made after grade and yield had been determined. The theory of the prosecution was that West knew when the purchases were made that ABP was insolvent and that checks issued by ABP in payment for the cattle would not be paid when presented; and West made an implied representation at the time of purchase that funds were or would be available when he knew otherwise.

The trial judge determined that the information as amplified by the bill of particulars did not state crimes under Iowa law and dismissed the information before trial.

The State of Iowa appealed from the dismissal and the Supreme Court of that state reversed and remanded the cause for trial. *State* v. *West, supra.* In that case, the Iowa Supreme Court held that under section 713.1, Iowa Code, a promise to perform a future act made with the intent not to perform it is sufficient to support a charge of obtaining property by false pretenses, that a misrepresentation may be made by words or actions, and that failure to disclose a material fact may be a misrepresentation.

West asserts the opinion of the Iowa Supreme Court is a judicial "expansion" of section 713.1, Iowa Code, and is contrary to the court's previous holdings that a promise to perform an act in the future made with an intent not to perform does not constitute a misrepresentation under section 713.1. It is, therefore, he contends, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively," which the Supreme Court of the United States has held is impermissible under the Fourteenth Amendment to the Constitution of the United States. *Bouie* v. *City of Columbia, supra. Bouie* does stand for the proposition for which it is cited. The question to be answered is whether it is sufficiently clear that the Iowa court did, in *State* v. *West, supra,* make an unforeseeable judicial enlargement of section 713.1, Iowa Code, so that we must hold the instruments of extradition do not show West is substantially charged with having committed a crime under Iowa law.

West quotes certain portions of the opinion in *State* v. *West, supra,* which, read by themselves, would indicate the Iowa court recognized it was in fact enlarging the statute contrary to its prior precedents and was not construing the statute for the first time with regard to the issues at hand. However, when one reads the whole opinion and examines some of the precedents therein mentioned, it is at least doubtful a retroactive enlargement of the statute was being accomplished. On the contrary, it is rather clear a deter-

mination of a previously undecided point was being made, and that the situation in *State* v. *West, supra,* was not covered by prior precedent, except possibly by assumption or dicta. The Iowa court prefaced its review of various prior opinions by noting: "[T]he cases failed to base the results on the issue discussed here, . . . None of the cases hold a charge of conviction of false pretenses invalid because of a failure to allege or prove a misrepresentation of past or existing fact, although the premise appears in the text of the opinions."

Some of the cases reviewed by the Iowa court in fact upheld false pretense charges and convictions where the only misrepresentation was one of present intention. *State* v. *Dowe*, 27 Iowa 273 (1869), is such a case. There it was contended that the facts pled showed a mere false promise and not a "misrepresentation." The charge involved the procuring of a signature on a receipt by the false pretense of an implied promise to pay. The court there said: "In the case before us, the pretense was the act of coming, and the averment that defendant had come, to pay the money. These, doubtless, implied a promise to pay, otherwise they could not have operated upon the mind of the party defrauded to induce him to make and sign the receipt. The act of the defendant in coming to the other party, proclaiming his intention and purpose to pay the money, is readily distinguishable from a promise so to do. A pretense may be gathered from the acts and conduct of a party." The false representation in that case was the undisclosed intention not to pay.

Another early Iowa case discussed in *State* v. *West, supra,* is *State* v. *Foxton*, 166 Iowa 181, 147 N.W. 347 (1914). That case involved a prosecution under the false pretense charge which grew out of the giving of a no-account check. In its discussion of *Foxton*, the Iowa Supreme Court said: "[T]his court found that the representation of a personal check implied that defendant had the ability to pay, sustaining a false pretenses charge."

The court also discussed *State* v. *Huckins*, 212 Iowa 283, 234 N.W. 554 (1931), in which it was held that "intention or knowledge" is a fact regarding which one may make a false pretense and "One's representation that he has actual knowledge may be inferred from the circumstances as may the intent." In that case the holding was related to the propriety of an instruction which in effect took away from the jury the determination of whether the defendant spoke from a personal knowledge and intended to be so understood, or whether, being without personal knowledge, he honestly believed the representations were true, in which case he would not be guilty under Iowa law.

After discussion of the precedents, the court concluded that the allegation the "defendants solicited orders for cattle, entered into a contract for the purchase of the same at a stated price and accepted delivery of them . . . implied the [representation of an] intent to pay for the cattle . . . when . . . the allegations made by the State in the indictments, if proven, would justify a jury in concluding the defendants had no intention to pay for the cattle," and remanded the *West* case for trial on the merits.

The rationale of *Bouie* v. *City of Columbia*, *supra*, is that a retroactive enlargement by judicial interpretation, contrary to previous precedent, of a statute defining a crime is in effect similar to an ex post facto statute because it fails to give fair warning the act in question is criminal. It is largely mythical to assume that persons who commit crimes consult the criminal code before acting, but if in this case it had been done and prior judicial precedents considered, the accused should have been warned the act of purchasing cattle and impliedly representing that payment was to be made while intending not to pay, might constitute a crime. As we read the Iowa precedents discussed, it is doubtful the interpretation of section 713.1, Iowa Code, in *State* v. *West*, *supra*, did constitute a departure from prior precedent. We believe, therefore, as a mat-

ter of policy, we ought not to determine the constitutional issue.

The question before us is analogous to that which is present when a contention is made that the statute of the demanding state which defines the crime is unconstitutional. Unless in such cases the statute has been found unconstitutional by either the court of last resort of the demanding state or the Supreme Court of the United States, the asylum state should not assume the determination of constitutionality. In *Denton* v. *Cronin*, 187 Colo. 247, 529 P.2d 644, the Supreme Court of Colorado held the accused could not avoid extradition to a sister state on the ground the law of that state was unconstitutional; comity required the accused to test the constitutionality of the statutes of the sister state in the courts of that state and, if unsuccessful there, then in the appropriate federal courts.

AFFIRMED.

APPENDIX B

Article IV, Section 2 of the Constitution of the United States provides:

> "Clause 2. A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial, ..."

The Uniform Criminal Extradition Act, adopted in Nebraska as R.R.S. 29-729 through 29-758 provides:

29-729. *Terms, defined.* Where appearing in sections 29-729 to 29-758, the term Governor includes any person performing the functions of Governor by authority of the law of this state. The term Executive Authority includes the Governor, and any person performing the functions of Governor in a state other than this state, and the term State, referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America.

29-730. *Fugitives from justice; Governor; duty.* Subject to the provisions of sections 29-729 to 29-758, the provisions of the Constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the Governor of this state to have arrested and delivered up to the Executive Authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

29-731. *Form of demand.* No demand for the extradition of a person charged with crime in another state shall be recognized by the Governor unless in writing alleging, except in cases arising under section 29-734, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the Executive Authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment or conviction or sentence must be authenticated by the Executive Authority making the demand.

29-732. *Governor; investigation; Attorney General.* When a demand shall be made upon the Governor of this state by the Executive Authority of another state for the surrender of a person so charged with crime, the Governor may call upon the Attorney General or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

29-733. *Persons; imprisoned or waiting trial; left the demanding state under compulsion; extradition.* When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the Governor of this state may agree

with the Executive Authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The Governor of this state may also surrender on demand of the Executive Authority of any other state any person in this state who is charged in the manner provided in section 29-751 with having violated the laws of the state whose Executive Authority is making the demand, even though such person left the demanding state involuntarily.

29-734. *Persons not present in demanding state at time of commission of crime; extradition.* The Governor of this state may also surrender, on demand of the Executive Authority of any other state, any person in this state charged in such other state in the manner provided in section 29-731 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose Executive Authority is making the demand, and the provisions of sections 29-729 to 29-758 not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

29-735. *Warrant of arrest; recitals; Governor; issuance.* If the Governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

29-736. *Warrant of arrest; execution; manner; place.* Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time

and any place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of sections 29-729 to 29-758 to the duly authorized agent of the demanding state.

29-737. *Arresting officer; authority.* Every such peace officer or other person empowered to make the arrest shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

29-738. *Rights of accused person; writ of habeas corpus; application.* No person arrested upon such warrant shall be delivered over to the agent whom the Executive Authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

29-739. *Rights of accused person; violation; penalty.* Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the Governor's warrant, in willful disobedience to section 29-738, shall be guilty of a misdemeanor and, on conviction, shall be fined not more than five hundred dollars or be imprisoned not more than six months, or both.

29-740. *Confinement; when necessary.* The officer or persons executing the Governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping; *Provided, however,* that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the Executive Authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.

29-741. *Arrest prior to requisition.* Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state and, except in cases arising under section 29-734, with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole,

or whenever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under section 29-734, has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

29-742. *Arrest without warrant.* The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in section 29-741; and thereafter his answer shall be heard as if he had been arrested on a warrant.

29-743. *Commitment to await requisition; bail.* If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under section 29-734, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusa-

tion, commit him to the county jail for such a time not exceeding thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the Governor on a requisition of the Executive Authority of the state having jurisdiction of the offense, unless the accused give bail as provided in section 29-744, or until he shall be legally discharged.

29-744. *Bail; bond; conditions.* Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the Governor of this state.

29-745. *Commitment; extension of time; adjournment.* If the accused is not arrested under warrant of the Governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed sixty days, or a judge or magistrate judge may again take bail for his appearance and surrender, as provided in section 29-744, but within a period not to exceed sixty days after the date of such new bond.

29-746. *Bail; forfeiture.* If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds given by the accused in criminal proceedings within this state.

29-747. *Persons under criminal prosecution in this state at time of requisition; Governor; discretionary powers.*

If a criminal prosecution has been instituted against such person under the laws of this state and is still pending the Governor, in his discretion, either may surrender him on demand of the Executive Authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

29-748. *Guilt or innocence of accused; when inquired into.* The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the Governor, except as it may be involved in identifying the person held as the person charged with the crime.

29-749. *Warrant; recall; alias; issuance.* The Governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

29-750. *Fugitives from this state; Governor's duty.* Whenever the Governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the Executive Authority of any other state, or from the Chief Justice or an Associate Justice of the Supreme Court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

29-751. *Requisition; application; contents; by whom made.* (1) When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the Governor his written application for a requisition for the return of the person charged in which application shall be stated the name of

the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein at the time the application is made and certifying that, in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

(2) When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the Governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

(3) The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the Governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information, and affidavits, or of the judgment

of conviction or of the sentence shall be filed in the office of the Secretary of State to remain of record in that office. The other copies of all papers shall be forwarded with the Governor's requisition.

29-752. *Costs; expenses; payment.* When the punishment of the crime shall be confinement of the criminal in the Nebraska Penal and Correctional Complex, the expenses shall be paid out of the state treasury, on the certificate of the Governor and warrant of the Auditor of Public Accounts; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose Governor the requisition is made, and not exceeding eight cents a mile for all necessary travel in returning such prisoner.

29-753. *Civil action; immunity from service of process in certain cases.* A person brought into this state by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he is being or has been returned, until he has been convicted in the criminal proceeding, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

29-754. *Extradition proceedings; written waiver.* Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in sections 29-735 and 29-736 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; *Provided, however,* that before such waiver shall be executed or subscribed by such person it shall be the duty of such

judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in section 29-738.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the Governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; *Provided, however,* that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state.

29-755. *Nonwaiver by this state.* Nothing in sections 29-729 to 29-758 contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under sections 29-729 to 29-758 which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever.

29-756. *No right of asylum or immunity from other criminal prosecutions while in this state.* After a person has been brought back to this state by, or after waiver of extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

29-757. *Act, how construed.* The provisions of sections 29-729 to 29-758 shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it.

29-758. *Act, how cited.* Sections 29-729 to 29-758 may be cited as the Uniform Criminal Extradition Act.